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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/582,336

Filing Date: May 25, 2007

Appellant(s): KAKUDO ET AL.

Brian K. Lathrop
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 10/12/2010 appealing from the Office action mailed 4/15/2010.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims pending: 1, 3-9, 11, 14, and 16-20

Claims rejected: 1, 3-9, 11, 14, and 16-20

Claims canceled: 2, 10, 12-13, 15, and 21-23

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

5,618,572 TRIPP et al. 4-1997
CarBomb, The Webtender, <http://www.webtender.com/db/drink/4194> (published February 10, 2003); accessed on 11/16/2009.

Guinness, Green's Discount Beverage Stores,
<http://www.greensbeverages.com/guinness.html> (published April 16, 2003); accessed on 11/17/2009.

Jameson® Irish Whiskey, DrinksMixer,
<http://www.drinksmixer.com/descl016.html> (published Oct. 19, 2003); accessed on 11/17/2009.

Guinness Stout, Drinks Mixer TM, <http://www.drinksmixer.com/desc586.html> (published October 9, 2003); accessed on 11/17/2009.

Irish Cream, DrinksMixer, <http://www.drinksmixer.com/desc54.html> (published October 11, 2003); accessed on 11/17/2009.

"Hoppy College: A Magazine Lecture," Hoppy de Happy Dokuhon, Kabushiki Kaisha Asupekuto (published Aug. 22, 2000) pp. 30-35. Appellant filed an English translation on 2/24/2010. The Office mailed an English language translation on 4/15/2010. The final rejection refers to the 4/15/2010 translation.

English language Abstract of Japanese Application No. JP 60-241883, SHINOZAKI.

Japan -Alcoholic Beverages, The Global Gourmet®, <http://www.globalgourmet.com/destinations/japan/alcoholic.html> (published October 4, 2003); accessed on 11/21/2009.

Japan - Taxes on Alcoholic Beverages, World Trade Organization, July 11, 1996.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

1. Claims 1, 3-6, 9, and 19-20 are rejected under 35 U.S.C. 102(b) as being anticipated by The Webtender, "CarBomb" (retrieved on 11/16/2009, published on 10 February 2003), as evidenced by the following: "Guinness" (retrieved on 11/17/2009,

published on 16 April 2003); Drinkmixer for Jameson's Whiskey (retrieved on 11/17/2009, published on 19 October 2003); Drinkmixer for Guinness Stout (retrieved on 11/17/2009, published on 9 October 2003); and Drinkmixer for Bailey's Irish Cream (retrieved on 11/17/2009, published on 11 October 2003).

Regarding claims 1-2 and 9, The Webtender teaches a malt fermented beverage (Carbomb) comprising an alcohol containing material made of fermented barley (Guinness stout) and an alcohol containing distillate made from barley (Jameson's Whiskey).

Regarding the alcohol content, The Webtender teaches mixing 13 oz of component A (Guinness) with 1 oz of component B (Whiskey) resulting in a volume ratio of 13:1. The alcohol content of component B (Jameson's) is 40% (see Drinkmixer Jameson's) and alcohol content of component A (Guinness Stout) is 4.1% (see Drinkmixer Guinness stout) and. Therefore, a ratio of the alcohol content from the components is 9.75:1 (Whiskey:Beer = .40/.041 = 9.75:1).

Regarding claims 3-6, Guinness is beer made with malt, barley, hops, and water (see "Guinness", p. 1, Brewing Materials section).

Regarding claim 19, The Webtender teaches using Jameson's Whiskey, which has 40% alcohol (80 proof, Drinkmixer for Jameson's Whiskey).

Regarding claim 20, The Webtender teaches mixing 13oz of component A (Guinness), 1oz component B (Whiskey), and 1oz Irish cream (Baileys). This results in an alcohol percentage of about 7.4% (Calculation: $C_aV_a + C_bV_b + C_{irish}V_{irish} = C_tV_t$ = $4.1\%(13oz) + 40\%(1oz) + 17\%(1oz) = 1.103; 1.103/15oz = 0.007353 = 7.353\%$).

Claim Rejections - 35 USC § 103

2. Claims 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over The Webtender, “CarBomb”, as evidenced by “Guinness” and Drinkmixer for Jameson’s Whiskey (retrieved on 11/17/2009, published on 19 October 2003); Drinkmixer for Guinness Stout (retrieved on 11/17/2009, published on 9 October 2003); and Drinkmixer for Bailey’s Irish Cream (retrieved on 11/17/2009, published on 11 October 2003), as applied to claims 1, 3-6, 9, and 19-20 above, and further in view of Tripp et al., USPN 5,618,572.

The Webtender is relied on as above.

The Webtender does not teach the malt proportion of component A.

Tripp is drawn to preparing beer and malt beverages (Abstract). Tripp teaches changing the malt proportion of beer changes the flavor profile of the final product (col. 8, ln. 67 to col. 9, ln. 1). Tripp suggests malt proportions from 26% (21/79 malt/dextrose, col. 8, ln. 63) to 127% (56:44 malt/dextrose, col. 9, ln. 1-2). Tripp also suggests using a beer comprising between 80-100% malt (col. 4, ln. 5). Tripp teaches the flavored malt beverages minimize the consumer sensation of fullness, meaning they are drinkable and refreshing (col. 9, ln. 30-31). Furthermore, Tripp suggests the malt base can be used as a mixture “for all manner of liquors” (col. 10, ln. 18-21).

Therefore, the flavor profile of the final product is deemed to be a result effective variable with regard to the malt proportion. It would require routine experimentation to determine the optimum value of a result effective variable, such as malt proportion, in the absence of a showing of criticality in the claimed malt proportion. One of ordinary

skill in the art at the time of invention would have been motivated to change the malt proportion, as taught by Tripp, to obtain a final product having acceptable drinkability and taste (col. 9, ln. 30-31). Furthermore, Tripp expressly suggests malt proportion ranges, which overlap the claimed ranges.

3. Claims 1, 3-6, 9, 11, 14, 16, 19, and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hoppy de Happy-to (“Hoppy de Happy Dokuhon”, Kabushiki Kaisha Asupekuto; 22 August, 2000) hereinafter “Hoppy”, in view of either Shinozaki et al., JP 60241883 (English Abstract) or Global Gourmet (retrieved on 11/21/2009, published on 10/04/2003), as evidenced by Japan – Taxes on Alcoholic Beverages.

Note the rejections refer to the human translation of the Hoppy document provided by the office and mailed on 4/15/2010.

Regarding claims 1 and 9, Hoppy teaches malt fermented beverage comprising two components. Component A is an alcohol containing material made of barley (Hoppy, translation p. 4, last paragraph). Component B is an alcohol containing distillate (shochu, p. 2, last paragraph).

Regarding the alcohol ratio of claim 1 and claim 19: Hoppy teaches the shochu is 25 degree. The examiner notes the appellant’s provided translation of the Japanese document translated text box number 1 on page 1 as 25 proof. However, the document actually states 25 degree. In Japanese tax law 25 degree alcohol equates to percent alcohol (Japan – Taxes on Alcoholic Beverages, p. 6, paragraph 2.3 and Shochu A

table). The December 2009 human translation of Hoppy translates the term "degree" as alcohol content by volume (p. 2, last paragraph).

Hoppy teaches component A has an alcohol content of 0.8% (p. 4, second to last paragraph). Therefore, a ratio of the alcohol content of the components is 31.25 (Shochu:Hoppy = 31.25 = .25/.008). In the event that the translation of Hoppy (provided on 05/25/2007) is correct and the Hoppy has a proof of 25, which is 12.5% alcohol, a ratio of alcohol content is 15.625 (Shochu:Hoppy = .125/.008).

Regarding claims 1, 11, 14, and 16, Hoppy does not teach the alcohol containing distillate (shochu) is made from wheat.

Shinozaki teaches an otsu mugi shochu that has a having mellow and rich flavor Shinozaki teaches the shochu is made from wheat. It would have been obvious to one of ordinary skill in the art at the time of invention to use a wheat shochu, as taught in Shinozaki, to obtain a malt beverage having otsu mugi shochu because the otsu mugi shochu has a mellow and rich flavor.

In the alternative, to Hoppy in view of Shinozaki, Hoppy teaches discloses the claimed material except for the materials used to make component B (shochu). Global Gourmet teaches shochu is made from various grains including wheat. It would have been obvious to one having ordinary skill in the art at the time the invention was made to select shochu made from wheat, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. MPEP 2144.07.

Regarding claims 3-5, Hoppy teaches component A (Hoppy) comprises malt, starch (cornstarch), and hops (p. 6, first full paragraph). Hoppy does not expressly teach component A comprises water. However, Hoppy teaches the ingredients are boiled together (p. 6, first full paragraph) and brewed in the same way as beer (p. 4, last paragraph). Therefore, Hoppy at least implies component A comprises water. In the alternative, Examiner takes official notice that beer comprises water.

Regarding claim 6, Hoppy teaches component A (Hoppy) is beer (p. 2, first paragraph).

Regarding claim 20, Hoppy teaches the alcohol content of the malt beverage is between 3% and 8% (translation p. 2, last paragraph).

4. Claims 7, 8, 17, and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hoppy de Happy-to ("Hoppy de Happy Dokuhon", Kabushiki Kaisha Asupekuto; 22 August, 2000) hereinafter "Hoppy", in view of either Shinozaki et al., JP 60241883 (English Abstract) or Global Gourmet (retrieved on 11/21/2009, published on 10/04/2003), as evidenced by Japan – Taxes on Alcoholic Beverages, as applied to claims 1, 3-6, 9, 11, 14, 16, 19, and 20 above and further in view of Tripp et al., USPN 5,618,572.

Hoppy in view of either Shinozaki or Global Gourmet is relied on as above.

Hoppy in view of either Shinozaki or Global Gourmet does not teach the malt content of component A.

Regarding claims 7, 8, and 17-18, Tripp is drawn to preparing beer and malt beverages (Abstract). Tripp teaches changing the malt proportion of beer changes the flavor profile of the final product (col. 8, ln. 67 to col. 9, ln. 1). Tripp suggests malt proportions from 26% (21/79 malt/dextrose, col. 8, ln. 63) to 127% (56:44 malt/dextrose, col. 9, ln. 1-2). Tripp also suggests using a beer comprising between 80-100% malt (col. 4, ln. 5). Tripp teaches the flavored malt beverages minimize the consumer sensation of fullness, meaning they are drinkable and refreshing (col. 9, ln. 30-31). Furthermore, Tripp suggests the malt base can be used as a mixture “for all manner of liquors” (col. 10, ln. 18-21).

Therefore, the flavor profile of the final product is deemed to be a result effective variable with regard to the malt proportion. It would require routine experimentation to determine the optimum value of a result effective variable, such as malt proportion, in the absence of a showing of criticality in the claimed malt proportion. One of ordinary skill in the art at the time of invention would have been motivated to change the malt proportion, as taught by Tripp, to obtain a final product having acceptable drinkability and taste (col. 9, ln. 30-31). Furthermore, Tripp expressly suggests malt proportion ranges, which overlap the claimed ranges.

Regarding the wheat spirit of claim 18, as discussed above, both Shinozaki and Global Gourmet teach the shochu is made from wheat.

Regarding claim 17, the limitation “is otsu-rui shochu” (otsu-rui shochu means produced in a batch distiller) is a method limitation and does not determine the patentability of the product, unless the process produces unexpected results. The

method of forming the product is not germane to the issue of patentability of the product itself, unless Applicant presents evidence from which the Examiner could reasonably conclude that the claimed product differs in kind from those of the prior art. MPEP 2113.

(10) Response to Argument

Findings of fact (appeal brief, p. 10)

Examiner has no comment concerning appellant's summary of the findings of fact (appeal brief, p. 10-13).

1. Examiner's interpretation of "ratio" (appeal brief, p. 14)

The claims recite a beverage comprising a component with alcohol from fermentation and a component with an alcohol from distillation. The claims recite the components are mixed within a recited ratio.

Appellant and Examiner disagree about the meaning of the phrase "wherein a ratio between. . . component A and . . . component B is . . . from about 97.5:2.5 to about 90:10" (appeal brief, p. 14). The question is whether "a ratio between A and B" can be interpreted as both a ratio of A:B and a ratio of B:A.

It is the Examiner's position that the limitation "a ratio between A and B" can be interpreted as either one of A:B or B:A (appeal brief, p. 11, ln. 1-5). "A ratio between A and B" can be interpreted as any ratio having both component A and component B. The phrase does not require either A or B to be the numerator or denominator. Specifically, the claim phrase lacks terminology requiring either A:B or B:A.

Examiner follows the interpretive guidance from the specification, but does not import claim limitations from the specification (appeal brief, p. 14, 2nd to last para). Although claims of issued patents are interpreted in light of the specification, prosecution history, prior art and other claims, this is not the mode of claim interpretation to be applied during examination. During examination, the claims must be interpreted as broadly as their terms reasonably allow. MPEP 2111.01 I. Though understanding the claim language may be aided by explanations contained in the written description, it is important not to import into a claim limitations that are not part of the claim. A particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment. MPEP 2111.01 II.

Appellant asserts the phrase “wherein a ratio between. . . component A and . . . component B is . . . from about 97.5:2.5 to about 90:10” in view of the specification necessarily means the ratio of component A to component B is between about 97.5:2.5 to about 90:10. However, the present claims recite a limitation that can be interpreted more broadly than the appellant's asserted meaning. While the present specification supports appellant's interpretation (Substitute specification, p. 13, Table 1), the present claims recite “wherein a ratio between. . . component A and . . . component B is . . . from about 97.5:2.5 to about 90:10” (claim 1). In other words, appellant's particular embodiment, i.e. the ratio of component A to component B is between about 97.5:2.5 to about 90:10, is one of two possible embodiments presently claimed. The claim

language also permits the claim to be interpreted as the ratio of component B to component A is between about 97.5:2.5 to about 90:10.

Examiner's interpretation is consistent with the plain meaning of the claims (appeal brief, p. 15). Appellant provides a definition of the term ratio. However, there is no question about the meaning of ratio. The issue is whether the phrase, a ratio between component A and component B is from about 97.5:2.5 to about 90:10, can be interpreted to mean either one of A:B or B:A. The present claim language can be interpreted in at least two ways. One way is the Applicant's interpretation. The Examiner's interpretation is an example of another interpretation. In other words, the present claim language does not necessarily claim the embodiments listed in the Specification, Table 1.

Appellant defines ratio as: "the quotient of one quantity divided by another" (appeal brief, p. 15). However, this definition fails to address the issue. While the term ratio means quotient of one quantity divided by another; the term by itself does not indicate which number is necessarily the "one quantity" or which number is "divided by another". The claim limitation identifies two quantities -component A and component B. However, the claim does not necessarily require the ratio to be either component A:component B or component B:component A.

Examiner relied on *Van Geuns* and MPEP 2111 to support the proposition that limitations from the specification are not incorporated into the claims (advisory action, mailed on 7/22/2010). Appellant distinguishes *Van Geuns* by arguing the appellant does not "attempt to add or subtract limitations from the claims" (appeal brief, p. 15, last line).

Examiner is not persuaded by this argument. Appellant is attempting to limit the phrase “wherein a ratio between . . . component A and . . . component B is . . . from about 97.5:2.5 to about 90:10” (claim 1) to mean the ratio of component A to component B is between about 97.5:2.5 to about 90:10. In other words, appellant argues the limitation means the ratio as disclosed in the specification.

Appellant states the Federal Circuit expressly condones the use of the specification during prosecution to ascertain the meaning of the claims (appeal brief, p. 16, para 1). Examiner agrees. However, is unclear how this argument supports the position that the examiner’s claim interpretation is unreasonable (appeal brief, p. 14).

2. Examiner’s interpretation of “alcohol content from” (appeal brief, p. 16)

Appellant argues the examiner’s interpretation of “alcohol content from” is unsupported (appeal brief, p. 16) and that the examiner disregarded claim terms (appeal brief, p. 16, last para). Examiner is not persuaded by these arguments. The claim recite “an alcohol content from” component A and “an alcohol content from” component B. Both Carbomb and Hoppy suggest a mixed drink comprising a fermented component and a distilled component (see rejections above). Both the components have an alcohol content. Therefore, the alcohol content in the final beverage is “from” the individual components.

The prior art discloses the “alcohol content from” as follows:

In the 35 USC 102(b) and 103(a) rejections of claim 1, 3-9, and 19-20, as anticipated by Carbomb and obvious over Carbomb in view of Tripp, the

component B (Whiskey) has a 40% alcohol content. The component A (Guinness) has a 4.1% alcohol content. A ratio of alcohol contents between components B and A is 40%:4.1%. So, a ratio between an alcohol content (4.1%) from component A (Guinness) and an alcohol content (40%) from component B (Whiskey) is 40%/4.1% or 9.75:1.

In the 35 USC 103 rejections over Hoppy in view of Shinazaki, Global Gourmet, and Tripp, the component A (Hoppy) has 0.8% alcohol. The component B (shochu) has 12.5% alcohol. A ratio of alcohol contents between components B and A is 12.5%:0.8%. So, a ratio between an alcohol content (0.8%) from component A (Hoppy) and an alcohol content (12.5%) from component B (shochu) is 12.5%/0.8% or 15.625:1.

Appellant argues the examiner fails to consider the doctrine of claim differentiation (appeal brief, p. 17, para 1). Appellant cites to *Philips* to support their argument. Examiner is not persuaded by this argument. The court notes that differences among claims can be a useful guide for understanding the meaning of particular claim terms. *Philips* at 1314. However, the *Philips* court does not go so far as to hold that claim differentiation necessarily determines the meaning of claims during patent examination. While claim differentiation acts as guidance, it does not determine the meaning of claim terminology during patent examination.

Examiner's interpretation of the term "from" finds support in the plain meaning of the term (appeal brief, p. 17, 2nd full paragraph). Appellant compares the language of claim 20 and the language of claim 1. Examiner is not persuaded by this argument for

several reasons. First, claim 1 recites the malt beverage components. Claim 20 recites the overall alcohol content of the beverage. Second, as discussed above, the prior art discloses both alcohol content from (with respect to claim 1) and alcohol content of (with respect to claim 20).

Furthermore, Examiner follows the interpretive guidance from the specification, but does not import claim limitations from the specification (appeal brief, p. 17, last paragraph). During examination, the claims must be interpreted as broadly as their terms reasonably allow. MPEP 2111.01 I. Though understanding the claim language may be aided by explanations contained in the written description, it is important not to import into a claim limitations that are not part of the claim. A particular embodiment appearing in the written description may not be read into a claim when the claim language is broader than the embodiment. MPEP 2111.01 II.

Appellant argues changing an “alcohol content of” the components does not change the ratio. However, changing alcohol contents from the components will change the ratio (appeal brief, p. 17, last para). Applicant may be correct in this explanation. However, the present claims recite a limitation that can be interpreted more broadly than the appellant's asserted meaning. The rejections explain how the prior art is applied to the claims. The prior art reads on the limitations as presently claimed.

Appellant argues Examiner only considers the ratios between the alcohol content of various components, but does not consider components A and B to achieve a ratio “from” A and B (appeal brief, p. 18, first para). Examiner is not persuaded by this argument. First, the rejections and response to arguments above explain how the prior

art discloses an alcohol content from components A and B. Additionally, as stated in the final office action (p. 9, 2nd to last para), the phrase “alcohol content” is not defined by the specification to mean concentration multiplied by volume. Therefore, the claim does not limit the meaning of alcohol content to the exemplary formulation in the Specification. As a result, the Examiner’s interpretation of the word “from” is not foreclosed by the present claim terminology.

3. Claims 1, 3-6, 9, and 19-20 are rejected un 35 USC 102(b) (appeal brief, p. 18)

Regarding the rejections of claims 1, 3-6, 9, and 19-20 under 35 USC 102, appellant argues the prior art does not apply to the appellant’s claim interpretation (appeal brief, p. 18). Examiner agrees. The prior art fails to disclose the ratio of component A to component B is about 97.5:2.5 to about 90:10. As discussed above, the appellant’s interpretation is one of two possible claim interpretations. The prior art does disclose the ratio of component B to component A is about 97.5:2.5 to about 90:10 (see rejections above).

4. Claims 7-8 are rejected under 35 USC 103(a) (appeal brief, p. 19)

Regarding the rejections of claims 7 and 8 under 35 USC 103, appellant extends their arguments from claims 1, 3-6, 9, and 19-20 under 35 USC 102 (appeal brief, p. 19). Examiner is not persuaded by these arguments for the reasons discussed above.

5. Claims 1, 3-6, 9, 11-16, 19-20 are rejected un 35 USC 103(a) (appeal brief, p. 20)

Regarding the rejections of claims 1, 3-6, 9, 11-16, and 19-20 under 35 USC 103 as obvious over Hoppy in view of Shinozaki or Global Gourmet, appellant argues the prior art does not apply to the appellant's claim interpretation (appeal brief, p. 20). Examiner agrees. The prior art fails to disclose the ratio of component A to component B is about 97.5:2.5 to about 90:10. As discussed above, the appellant's interpretation is one of two possible claim interpretations. The prior art does disclose the ratio of component B to component A is about 97.5:2.5 to about 90:10 (see rejections above).

Appellant argues examiner used the incorrect alcohol content for Shochu (p. 21, para 2). However, both the non-final and final actions calculated the ratio with both 25% and 12.5% alcohol (non-final, mailed 11/25/2009, p. 6, top para; final, p. 6, para 2).

6. Claims 7-8 and 17-18 are rejected under 35 USC 103(a) (appeal brief, p. 21)

Regarding the rejections of claims 7-8 and 17-18 under 35 USC 103 as obvious over Hoppy in view of Shinozaki or Global Gourmet and Tripp, appellant argues the prior art does not apply to the appellant's claim interpretation (appeal brief, p. 21). It is the Examiner's position that the rejections above disclose an embodiment of the presently claimed invention. Examiner does not agree the appellant's claim interpretation for the reasons discussed above.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/WM/ Walter Moore,
Examiner AU 1789

Conferees:

/Keith D. Hendricks/
Supervisory Patent Examiner, Art Unit 1781

/William Krynski/
Quality Assurance Specialist, TC 1700